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THE SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301

15 SEP 1972

MEMORANDUM FOR THE PRESIDENT

SUBJECT: Fisheries Dispute with Ecuador

In reviewing the State Department proposal, the Department of Defense is desirous of lending support to its ultimate objectives, that is, resolution of the tuna boat seizure problem and normalization of relations with Ecuador. However, these objectives must be reviewed in proper perspective to other defense security interests. I do not believe the State Department scenario, in its present form, can be implemented without prejudice to these interests.

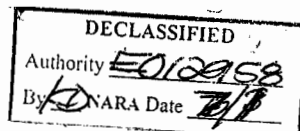
The State Department proposal suggests there is a similarity between the recently concluded Brazil shrimp agreement and the recommended scenario for an Ecuadorian settlement. Quite to the contrary, Defense believes there are great dissimilarities; it is in these dissimilarities that I see serious problems with law of the sea issues.

1. Zonal Approach. Shrimp are not highly migratory, and our oceans policy would favor a preferential right in the coastal state. Such was clearly the case in the Brazil agreement. By contrast we favor an international regime for tuna and other migratory species. Entering into an interim agreement in which Ecuador is given a preference over tuna is a marked departure from announced policy and seriously undermines our negotiating position for the 1973 Law of the Sea Conference. Moreover, US acknowledgement of coastal state preference in the absence of a broad multilateral agreement clearly belies our repeated assertion that the US does not recognize territorial seas greater than 3 miles nor contiguous fishing zones greater than 12 miles. The Department of Defense is not responsible for formulation of US long-term fisheries policy but must be concerned when the credibility of our juridical and negotiating positions on law of the sea may be jeopardized by shifts in this policy.

Classified by _____ Sec Def
SUBJECT TO GENERAL DECLASSIFICATION SCHEDULE OF
EXECUTIVE ORDER 11652. AUTOMATICALLY DOWNGRADED
AT TWO YEAR INTERVALS. DECLASSIFIED ON 31 Dec 78

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2. Area. The Brazil agreement delineates an ocean area, the landward boundary of which is the 30-meter isobath line off the Brazilian coast. The Ecuador scenario concerns an area based from the United States point of view, on the conservation lines as established by the Inter-American Tropical Tuna Commission, although recognizing that Ecuador would interpret the area as coinciding with its claimed territorial sea. A glance at the Tuna Commission lines confirms that there is no resemblance between them and the 200-mile claim of Ecuador. Nevertheless, the scenario is vague on this issue and without more specific guidelines there is nothing to ensure that the agreed delimitations will not be used as a basis for Ecuadorian or third-party claims that the US has abandoned its law of the sea policy of non-recognition of expansive territorial sea claims.

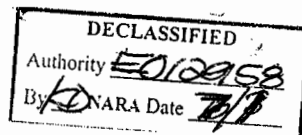
3. Fees. The Brazil agreement specifically provides that sums paid are compensation for the enforcement activities of Brazil. The Ecuador scenario provides for a purely oral arrangement which is so clearly a licensing agreement, with documents to be issued by Ecuador, that attempts by us to justify it on any other terms would simply not be credible. The interim procedure would convey an undeniable overtone of acquiescence in Ecuador's jurisdiction over claimed territorial waters. The oral understanding contains no elements that would protect the US juridical position on the law of the sea. All indications are that Ecuador would deny the existence of a conservationist scheme. In the absence of a written agreement it might well appear to the international community that Ecuador had given nothing in return for the lifting of the FMS ban and the purchase of fishing licenses by the USG.

4. Juridical Positions. The Brazil agreement specifically sets forth the juridical positions of both parties and disclaims any interest prejudicial to either. No such element exists in the Ecuador scenario, and, in view of Ecuador's apparent unwillingness to accept a Brazil-type agreement, it cannot be assumed that they will accept these essential clauses.

5. Conservation. The Brazil agreement specifically indicates conservation as a purpose. The Ecuador scenario

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is silent on this matter nor can it be reasonably assumed that Ecuador will be amenable to such a clause.

The overriding point to be borne in mind is that all of these deleterious factors form part of the scenario upon which we will be operating as soon as the FMS ban is lifted. It would be unrealistic to proceed on the hope that in subsequent formal negotiations we can achieve a more favorable position from a law of the sea point of view in the final agreement.

The Brazil agreement could legitimately be supported as a conservation agreement which did not unduly derogate our national security objective in law of the sea. The broad and somewhat vague outline of the Ecuador scenario provides no such basis. It is essentially an oral licensing agreement with provision for further negotiation. In its present form I believe it to be inimical to overall US law of the sea objectives.

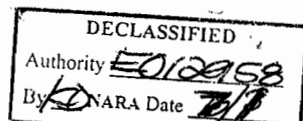
Although not related directly to our concern over law of the sea issues there are additional factors that warrant careful consideration.

The starting point of the current proposal is to be the unilateral waiving of the existing ban on Foreign Military Sales to Ecuador by the United States. The basis for requesting the waiver is the assumption that the understanding developed in private discussions between Acting Foreign Minister Moncayo and Ambassador McKernan of itself constitutes adequate assurances that there will be no further seizures. The Foreign Military Sales Act requires that reasonable assurances against further seizures be given as a condition for the lifting of the FMS suspension. The Ecuadorian Government apparently cannot and certainly will not give these assurances officially. Quite apart from the legal question of whether or not these private discussions constitute reasonable assurances within the meaning of the FMS Act, there is the very real danger of enormous political embarrassment if such assurances should not prove to have been adequate after the FMS ban had been lifted.

It is unknown to what degree the resumption of MAP and FMS may be motivating Ecuador in seeking a solution to the fisheries dispute. In any case, there are a number

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of real obstacles to a timely resumption of military assistance or of credit sales if the ban is lifted. Any misunderstanding or disappointment generated because of a failure to appreciate these realities could easily result in even worsened relations between the two countries. Ecuador is now in arrears on a sales contract negotiated under the Foreign Assistance Act of 1967. From experience in the past, it is believed that Ecuador, unfortunately, does not intend to honor that debt. The provisions of the act prohibit resumption of military assistance until the arrearage is paid. An Executive determination could waive the statutory prohibition but only after notification to Congress which has not yet been notified that Ecuador is in arrears. After execution of the Presidential waiver, Ecuador would still not be eligible for military assistance until a new MAP agreement can be negotiated. In the case of credit sales, it is doubtful if Congress would approve more credit for a country in default on a prior transaction. The resumption of military assistance presupposes the reinstatement of a US military mission in Ecuador. Finally, on the matter of compensation for the interim licensing period, there are no appropriated assistance funds or material in kind in the military assistance program that can be used for such purpose.

It is my view that any further discussions with Ecuador must be conducted in such a manner as to avoid any possible prejudice to US juridical positions on the law of the sea, particularly those involving US security interests. At all costs we must avoid undercutting negotiations in preparation for and during a Law of the Sea Conference, and must avoid any appearance that we are willing to accommodate US fishing interests by recognizing in any way Ecuador's claim to a 200-mile territorial sea.

I believe the proper approach would be to continue the dialogue with Ecuador in an effort to develop a scenario based in fact on conservation principles. It is in the interests of both parties to solve the fisheries dispute; it is certainly of paramount interest to the US to do so in such a way that our law of the sea security objectives are protected. In pursuing the dialogue I continue to believe it would serve our best interest to seek Ecuador's assurance of positive support for US law of the sea positions.

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